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to recess the investigational hearing or deposition and reconvene it at a later date, the witness compelled to reappear may challenge the reconvening by filing with the Secretary a petition to limit or quash the reconvening of the hearing or deposition. Such petition shall be filed within 5 days after receiving written notice of the reconvened hearing; shall set forth all assertions of protected status or other factual and legal objections to the reconvening of the hearing or deposition, including all appropriate arguments, affidavits, and other supporting documentation; and shall be subject to the word count limit in paragraph (a)(1) of this section. Except for good cause shown, the Commission will not consider issues presented and ruled upon in any earlier petition filed by or on behalf of the witness.

(4) *Staff reply.* Commission staff may, without serving the petitioner, provide the Commission a statement that shall set forth any factual and legal response to the petition to limit or quash.

(5) *Extensions of time.* The Directors of the Bureaus of Competition, Consumer Protection, and Economics, their Deputy Directors, the Assistant Directors of the Bureaus of Competition and Economics, the Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and the Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon requests for extensions of time within which to file petitions to limit or quash Commission compulsory process.

(b) *Stay of compliance period.* The timely filing of a petition to limit or quash any Commission compulsory process shall stay the remaining amount of time permitted for compliance as to the portion or portions of the challenged specifications or provisions. If the petition is denied in whole or in part, the ruling by the Commission shall specify new terms for compliance, including a new return date, for the Commission's compulsory process.

(c) *Disposition and review.* The Commission will issue an order ruling on a petition to limit or quash within 30 days after the petition is filed with the Secretary. The order may be served on

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the petitioner via email, facsimile, or any other method reasonably calculated to provide notice to the petitioner of the order.

(d) *Public disclosure.* All petitions to limit or quash Commission compulsory process and all Commission orders in response to those petitions shall become part of the public records of the Commission, except for information granted confidential treatment under §4.9(c) of this chapter.

[77 FR 59308, Sept. 27, 2012]

§2.11 Withholding requested material.

(a)(1) Any person withholding information or material responsive to an investigational subpoena, CID, access order, or order to file a report issued pursuant to §2.7 of this part, or any other request for production of material issued under this part, shall assert a claim of protected status, as that term is defined in §2.7(a)(4), not later than the date set for the production of the material. The claim of protected status shall include a detailed log of the items withheld, which shall be attested by the lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim. A document, including all attachments, may be withheld or redacted only to the extent necessary to preserve any claim of protected status. The information provided in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. The failure to provide information sufficient to support a claim of protected status may result in a denial of the claim. Absent an instruction as to the form and content of the log, the log shall be submitted in a searchable electronic format, and shall, for each document, including attachments, provide:

- (i) Document control number(s);
- (ii) The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);
- (iii) A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;

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(iv) The date the material was created;

(v) The date the material was sent to each recipient (if different from the date the material was created);

(vi) The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;

(vii) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors;

(viii) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;

(ix) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;

(x) The factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and

(xi) Any other pertinent information necessary to support the assertion of protected status by operation of law.

(2) Each attorney who is an author, recipient, or person copied on the material shall be identified in the log by an asterisk. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, the information required by paragraph (a)(1)(vi) of this section shall be provided in the log.

(b) A person withholding responsive material solely for the reasons described in paragraph (a) of this section shall meet and confer with Commission staff pursuant to §2.7(k) of this part to discuss and attempt to resolve any issues associated with the manner and form in which privilege or protection claims will be asserted. The participants in the meet and confer session may agree to modify the logging requirements set forth in paragraph (a) of this section. The failure to comply

with paragraph (a) shall constitute noncompliance subject to judicial enforcement under §2.13(a) of this part.

(c) Unless otherwise provided in the instructions accompanying the compulsory process, and except for information or material subject to a valid claim of protected status, all responsive information and material shall be produced without redaction.

(d)(1)(i) The disclosure of material protected by the attorney-client privilege or as work product shall not operate as a waiver if:

(A) The disclosure is inadvertent;

(B) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) The holder promptly took reasonable steps to rectify the error, including notifying Commission staff of the claim and the basis for it.

(ii) After being so notified, Commission staff must:

(A) Promptly return or destroy the specified material and any copies, not use or disclose the material until any dispute as to the validity of the claim is resolved; and take reasonable measures to retrieve the material from all persons to whom it was disclosed before being notified; or

(B) Sequester such material until such time as an Administrative Law Judge or court may rule on the merits of the claim of privilege or protection in a proceeding or action resulting from the investigation.

(iii) The producing party must preserve the material until the claim of privilege or protection is resolved, the investigation is closed, or any enforcement proceeding is concluded.

(2) When a disclosure is made that waives attorney-client privilege or work product, the waiver extends to an undisclosed communication or information only if:

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or material concern the same subject matter; and

(iii) They ought in fairness to be considered together.

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